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No. 466

In the Supreme Court of the United States

OCTOBER TERM, 1932

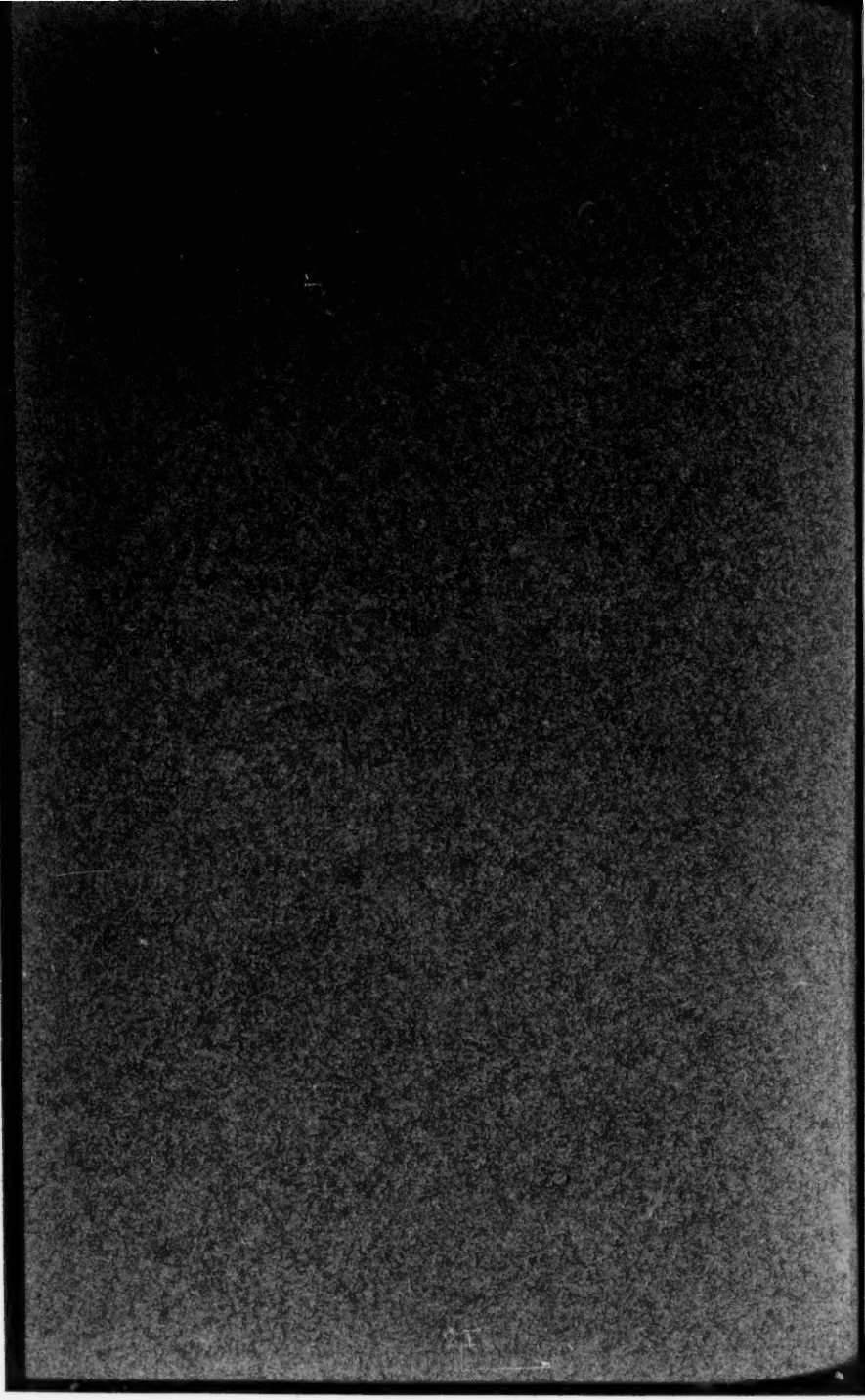
ESTHER JACKSON PORTER, AS EXECUTRIX, AND RICHARD L. DAVISSON, AS SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM H. PORTER, DECEASED, PETITIONERS

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT



INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	5
Argument	10
I. Congress has power under the Constitution to provide that transfers such as those here in question shall be included in the measure of the estate tax	10
(A) The powers reserved by the decedent included a general power to appoint by will as well as the power to dispose of the property to others during life	11
(B) The transfers were not complete until the decedent's death	15
(C) The power which the decedent reserved was a valuable interest in the corpus of the trust	25
(D) Under the New York law, the decedent had the effective power to revoke the trusts even for his own benefit	26
II. Congress has exercised the power to provide that the property here in question shall be included in the measure of the estate tax	30
(A) The transfers were intended to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926	30
(B) Section 302 (d) of the Revenue Act of 1926 requires the inclusion of the value of the property in the gross estate	34
Conclusion	39
Appendix A (statutes and regulations involved)	40–43
Appendix B (Congressional Committee reports)	44

CITATIONS

Cases:	
Aranyi v. *Bankers Trust Co.*, 201 App. Div. 706	29
Blackburne v. *Brown*, 43 F. (2d) 320	13
Brady v. *Ham*, 45 F. (2d) 454	24

Cases—Continued. Page

Bromley v. *McCaughn*, 280 U. S. 124 14
Bullen v. *Wisconsin*, 240 U. S. 625 17
Burnet v. *Northern Trust Co.*, 283 U. S. 782 ..... 24, 33
Chanler v. *Kelsey*, 205 U. S. 466 13
Chase National Bank v. *United States*, 278 U. S. 327 ..... 14, 17, 23
Commissioner v. *Emery*, C. C. A. 7th, decided Nov. 26, 1932 23
Countess of Roscommon v. *Fowke*, 6 Bro. P. C. 158 12
Corliss v. *Bowers*, 281 U. S. 376 21
Cover v. *Burnet*, 53 F. (2d) 915 24
Cruger v. *Union Trust Co.*, 173 App. Div. 797 29
DeGanay v. *Lederer*, 250 U. S. 376 32
Doe ex dem. Delegal v. *Holloway*, 1 Stark. N. P. 431 12
Faulkner v. *Irving Trust Co.*, 231 App. Div. 87 ..... 29, 30
Fidelity-Philadelphia Trust Co. v. *McCaughn*, 34 F. (2d) 600, certiorari denied, 280 U. S. 602 13
Franklin v. *Chatham Phenix Nat. Bank & Trust Co.*, 234 App. Div. 369 29
Fulham's Estate, In re, 96 Vt. 308 31
Guaranty Trust Co. v. *Blodgett*, No. 217, Oct. Term, 1932, decided Jan. 9, 1933 32
Gwinn v. *Commissioner*, No. 31, Oct. Term, 1932, decided Dec. 5, 1932 ..... 14, 18, 31, 34, 37, 38
Heiner v. *Donnan*, 285 U. S. 312 23
Hoeper v. *Tax Commission*, 284 U. S. 206 23
Hoskin v. *Long Island Loan & Trust Co.*, 203 N. Y. 588, affirming, 139 App. Div. 258 29
Jackson ex dem. Hammond v. *Veeder*, 11 Johns. 169 12
Kibbett v. *Lee*, Hob. 312 12
Klein v. *United States*, 283 U. S. 231 ..... 19, 22, 32
Lee v. *Commissioner*, 57 F. (2d) 399, certiorari denied, 286 U. S. 563 13
May v. *Heiner*, 281 U. S. 238 ..... 24, 33
Meyer v. *Bank of Manhattan Trust Co.*, 232 App. Div. 228 30
Milliken v. *United States*, 283 U. S. 15 32
Minis v. *United States*, 66 C. Cls. 58, certiorari denied, 278 U. S. 657 13
Morice v. *Bishop of Durham*, 10 Ves. 522 26
Old Colony R. Co. v. *Commissioner*, 284 U. S. 552 32
O'Shaughnessy v. *Commissioner*, 60 F. (2d) 235, No. 604, Oct. Term, 1932 23
Pennsylvania Co. v. *Lederer*, 292 Fed. 629 13
Phillips v. *Dime Trust & Safe Deposit Co.*, 284 U. S. 160 ..... 22, 32
Reinecke v. *Northern Trust Co.*, 278 U. S. 339 ..... 14, 15, 16, 18, 21, 24, 27, 28, 32, 33, 35, 36
Russell Motor Car Co. v. *United States*, 261 U. S. 514 35
Saltonstall v. *Saltonstall*, 276 U. S. 260 17
Schenck v. *Ellingwood*, 3 Edw. Ch. 175 12
Schwartz v. *Fulton Trust Co.*, 119 Misc. 831 29

Cases—Continued. Page

Shattuck, Matter of, 193 N. Y. 446 ... 26

Sperry v. *Farmers' Loan & Trust Co.*, 154 App. Div. 447 ... 29

Stratton v. *United States*, 50 F. (2d) 48, certiorari denied, 284 U. S. 651 ... 13

Third National Bank v. *White*, decided December 19, 1932, No. 202, October Term, 1932 ... 19, 21, 22, 34, 37, 38, 39

Tyler v. *United States*, 281 U. S. 497 ... 19, 20, 21, 22, 37, 38

Ward v. *Stanard*, 82 App. Div. 386 ... 12

Washburn v. *White*, D. Mass., decided Nov. 29, 1932 ... 24

Whitlock-Rose v. *McCaughn*, 21 F. (2d) 164 ... 13

Statutes:

United States Statutes—

Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 202 ... 31

Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 402 ... 31

Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 402 ... 31

Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 302 ... 31

Revenue Act of 1926, c. 27, 44 Stat. 9—

Sec. 301 (U. S. C. App., Title 26, Sec. 1092) ... 40

Sec. 302 (U. S. C. App., Title 26, Sec. 1094) ... 40–42

New York Statutes:

N. Y. Laws, 1909, c. 247 ... 27

Personal Property Law, Sec. 23 ... 27, 28, 29, 30

Real Property Law, Sec. 163 ... 12

Miscellaneous:

American Law Institute, Restatement of Property, Secs. 1–7 ... 16

Bispham, Principles of Equity (9th ed.) Sec. 256 ... 26

Farwell, Powers (2d ed.) 173 ... 12

H. Rep. No. 179, 68th Cong., 1st sess., p. 65 ... 44

4 Kent, Commentaries (12th ed.) 330, 332–333 ... 11, 12

1 Perry, Trusts and Trustees (7th ed.), Sec. 108 ... 26

Treasury Regulations 70—

Art. 18 ... 43

Art. 19 ... 43

S. Rep. No. 398, 68th Cong., 1st sess., pp. 34–35 ... 44

1 Sugden, Powers (3d ed.) 312–316 ... 12

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v.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 111–116) is reported in 60 F. (2d) 673. The opinion of the Board of Tax Appeals (R. 49–62) is reported in 23 B. T. A. 1016.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 26, 1932. (R. 116–117.) The

petition for a writ of certiorari was filed October 24, 1932, and was granted November 14, 1932. (R. 117.) The jurisdiction of this Court rests on Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Congress has power under the Constitution to provide that in computing the Federal estate tax there shall be included in the measure of the tax the value of property transferred by the decedent in trust, subject to the power of the decedent alone to modify or alter the trust in any way except in his own favor or in favor of his estate.

2. If Congress has such power, whether it has been exercised by Section 302 (c) or 302 (d) of the Revenue Act of 1926.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, pp. 40–43.

STATEMENT

The facts found by the Board of Tax Appeals (R. 44–49) may be summarized as follows:

The petitioners are the executors of the estate of William H. Porter, who died a resident of New York on November 30, 1926. (R. 44.)

On October 18, 1918, William H. Porter transferred to the Bankers Trust Company, as trustee, certain bonds. (R. 44.) On February 1, 1919, Porter transferred to the Bankers Trust Company,

as trustee, certain other bonds. (R. 44–45.) In each case a trust instrument was executed containing this provision (R. 45):

> Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the trustee or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing, * * * and no one, born or unborn, shall have any right, interest, or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interest of third parties may be concerned.

These trusts are referred to as the Helen Porter Davisson Trusts Nos. 1 and 2.

In order to provide for two grandchildren born after the creation of these trusts, the decedent determined to exercise the power reserved to him in the tenth paragraph of the trust deeds. (R. 46.) Accordingly, on November 27, 1926, he directed to the trustee a letter with respect to each trust in which he said "I hereby revoke said Deed and

terminate the interests of all persons therein," and he directed the trustee to deliver the principal and income which it then held to itself "as Trustee under a new Deed of Trust." (R. 46.)

At the same time William H. Porter executed a new trust agreement conveying to the Bankers Trust Company, as trustee, the same securities which had been held on the earlier trusts. This new trust agreement contained instructions to the trustee as to the management of the funds and investment and reinvestment of the principal similar to those contained in the first two trusts. (R. 46–47.) The new trust also contained the same paragraph "Tenth" which has been set out above. (R. 47.) This trust is referred to as the Helen Porter Davisson Trust No. 3.

On October 18, 1918, and June 27, 1919, the decedent created two other trusts, each containing the same provisions by which the decedent reserved the right and power to modify and alter the trust as those in the trusts already referred to. (R. 47–48.) These trusts are referred to as the Jamie Porter Trusts Nos. 1 and 2.

The Commissioner of Internal Revenue included in the decedent's gross estate the sum of $211,125 as representing the value on the date of the decedent's death of the securities included in the Helen Porter Davisson Trust No. 3 executed on November 27, 1926. (R. 47.) The Board of Tax Appeals sustained this action. At the hearing before the Board the Commissioner moved to increase the

deficiency by including in the gross estate $212,000 in addition, as the value of the securities held under the Jamie Porter Trusts Nos. 1 and 2, referred to above. The Board upheld this action of the Commissioner. Three members dissented from the conclusions of the Board.

The petitioners appealed to the Circuit Court of Appeals for the Second Circuit, which affirmed the decision of the Board, except on a question which is no longer in issue. (R. 116–117.)

SUMMARY OF ARGUMENT

I

A. The powers reserved by the decedent included a general power to appoint the property by will, as well as the power to appoint to others during life. The trust provided that the power might be exercised "by instrument in writing." A will of the decedent would plainly have been a valid exercise of the power, if it was also acknowledged in the manner required for a deed of real estate. Congress may validly impose an estate tax upon the exercise of a power of appointment by will. Since the exercise of a power may be taxed, the failure to exercise it is likewise within the taxing power of Congress.

The decedent also retained the power to control the disposition of the property to others during his life. This power was an incident to ownership at least as great as the power to make a gift of the property, which this Court has held may validly

be made the subject of a tax measured by the value of the property. *Bromley* v. *McCaughn*, 280 U. S. 124.

B. The transfers were not complete until the decedent's death; consequently Congress had power to include their value in the measure of the gross estate. This question turns on the effect of the power granted to the decedent in the trust instruments to "modify or alter" the trusts "in any manner," with the qualification that this power should not be exercised in his own favor.

The petitioners contend that the trusts were "irrevocable"; but this ignores the plain language of the trust instrument and the substantial effect of its provisions. The petitioners also state that the transfers in the present case were "complete" when the trusts were made; but in this, we believe, they have assumed the real issue in the case.

A brief analysis of the substance of the transactions shows (1) that the decedent retained important interests in the trust property, (2) that because of these interests which he retained the transfers to the beneficiaries of the trusts were only inchoate until his death, (3) that the effect of the decedent's death was to terminate the powers which he retained and thus to transfer to the beneficiaries of the trusts valuable property rights, and (4) that consequently there was a transfer effective on the decedent's death which is properly the subject of the estate tax.

The correctness of this conclusion is supported by several decisions of this Court, holding that when the interest of a beneficiary remains incomplete until the death of the settlor the termination of the settlor's power at his death may properly be the occasion for the imposition of the tax.

These decisions are not inapplicable because the tax involved is an estate tax and not a succession tax. Until the decedent's death, the beneficiaries had no power to dispose of the property; that power was retained by the decedent. After the decedent's death and as a result of it, the beneficiaries acquired the power of disposition. It is obvious that property rights which were the decedent's until his death became property rights of the beneficiaries after his death and as a result of his death. There was thus a transfer which may properly be made the subject of a transfer tax.

C. The power which the decedent reserved was a valuable interest in the corpus of the trust, and as such might validly be included in the measure of the estate tax. The decedent had unfettered power to determine who should be the beneficiary of the trusts. Such a power placed the decedent in a position to bargain with a new beneficiary. The value of this power retained by the decedent may fairly be valued by the value of the trust property.

D. The decedent did in fact and in substance have the power to revoke the trusts even for his own benefit. This conclusion follows, we believe,

from the provisions of Section 23 of the New York Personal Property Law as applied in the decisions of the New York courts. Under Section 23 the creator of a trust may revoke it at any time with the consent of the beneficiaries. In the present case it was within the power of the settlor to alter or amend the trusts at any time so as to make any person other than himself the beneficiary. Thus, he alone had the absolute and unfettered power to determine who should be the beneficiary. This power to determine who should be the beneficiary, together with the power to revoke the trust with the consent of the beneficiary granted by Section 23 of the New York Personal Property Law, gave the decedent in substance the power to revoke the trust.

II

A. The value of the trust property must be included in the decedent's gross estate under Section 302 (c) of the Revenue Act of 1926, as a transfer intended to take effect in possession or enjoyment at or after death. It is clear from the provisions of Sections 302 (c) and 302 (h) of the Revenue Act of 1926 that if the interests of the beneficiaries of these trusts were intended to take effect in possession or enjoyment at or after death, Congress intended that the value of the property transferred should be included in the gross estate. The trusts involved in this case were created not earlier than 1918, after the first enactment of the provisions

included in Section 302 (c) of the Revenue Act of 1926. Therefore, there can be no question of unconstitutionality on the basis of retroactivity.

The decedent had until his death absolute control over the interest of any beneficiary, and until his death it could not be determined whether the beneficiaries designated would receive anything. Where such dominion is retained over property that the identity of the beneficiaries and the extent to which they benefit can not be definitely determined until the settlor's death, clearly the disposition is one "intended to take effect in possession or enjoyment" at or after the settlor's death.

B. The value of the trust property must also be included in the decedent's gross estate under Section 302 (d) of the Revenue Act of 1926, since the decedent retained the power to modify or alter the trusts in any manner. Section 302 (d) is in plain and unmistakable language. So far as the question of construction is concerned, we believe that it is plain that Congress intended that the trust property involved in this case should be included in the measure of the gross estate.

Section 302 (d) may constitutionally be applied to trusts created before its enactment. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. The only difference between that case and this is that here the decedent's power to "modify or alter" the trusts "in any manner" was subject to the qualification that he might not make himself beneficiary.

But the interests of the beneficiaries were no less indefinite or uncertain because of this qualification of the power. The decedent retained the unfettered right and power to terminate their interests at any time. The ceasing of this power on his death was in substance the transfer to them at that time of valuable property rights. *Third National Bank* v. *White,* No. 202, October Term, 1932, decided December 19, 1932.

ARGUMENT

The decision of this case turns on the effect of the provisions which were included in the tenth paragraph of each of the trust instruments and set out on p. 3, above. We contend in Point I that Congress may constitutionally provide that such transfers shall be included in the measure of the estate tax, and in Point II that Congress has exercised this power.

I

CONGRESS HAS POWER UNDER THE CONSTITUTION TO PROVIDE THAT TRANSFERS SUCH AS THOSE HERE IN QUESTION SHALL BE INCLUDED IN THE MEASURE OF THE ESTATE TAX

The constitutionality of a statute providing that transfers such as those involved in this case shall be included in the measure of the estate tax may be supported, we believe, on any one of four grounds. While these grounds are not wholly independent, they are presented in the four subdivisions of this Point below.

A. The powers reserved by the decedent included a general power to appoint by will as well as the power to dispose of the property to others during life

The power reserved by the decedent in this case was in terms to "modify or alter" the trusts "in any manner." The power thus included a general power to appoint the property by will, as well as the power to appoint to others during life. A power may be exercised by deed or will or simply in writing, unless the intention to restrict its exercise in some particular manner is expressed. 4 Kent, *Commentaries* (12th ed.) 330. The only qualification on the *manner* of exercising the power in this case was that it be—

> by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee * * *.

That this qualification did not require that the power be exercised by deed is plain, for it expressly provided that the power might be exercised "by instrument in writing." A will of the decedent would plainly have been a valid exercise of the power, if it was also "acknowledged or proved by him in the manner required for a deed of real estate."[1]

[1] Even if the will had not met all the formal requirements of a deed of real estate, the defect could have been corrected

Jackson ex dem. Hammond v. *Veeder*, 11 Johns. 169 (N. Y.), is almost exactly in point. There the power could be exercised (p. 170) "by an instrument in writing under her hand and seal, signed in the presence of two credible witnesses." The donee of the power exercised it by (p. 171) "her last will and testament, duly signed, sealed and published in the presence of three credible witnesses." The court held (p. 171):

> There can be no doubt that the instrument by which the power was attempted to be executed, comported with the directions of the power. It was an instrument in writing, under her hand and seal, and signed in the presence of two credible witnesses, and was intended by her as an execution of the power being made with express reference to it.

To the same effect are *Kibbett* v. *Lee*, Hob. 312; *Countess of Roscommon* v. *Fowke*, 6 Bro. P. C. 158; *Doe ex dem. Delegal* v. *Holloway*, 1 Stark. N. P. 431; 1 Sugden, *Powers* (3d Am. ed.) 312–316; Farwell *Powers* (2d ed.) 173.

The fact that the power reserved by the decedent to alter or amend the trust did not allow him to make himself beneficiary is obviously not significant. The donee of a general power to appoint by will can never appoint the property to himself. Nor is the question affected by the provision that

in equity. *Ward* v. *Stanard*, 82 App. Div. 386; *Schenck* v. *Ellingwood*, 3 Edw. Ch. 175 (N. Y.); see N. Y. Real Property Law, Sec. 163; 4 Kent, *Commentaries* (12th ed.) 332–333.

the alteration could not be made in favor of the decedent's "estate." His estate could not use or enjoy the property; " estate " is simply a shorthand expression to include a number of persons, such as legatees, heirs, or creditors, and the decedent had the power to appoint to those persons if he chose.

It is apparently well settled that Congress may validly impose an estate tax upon the exercise of a power of appointment by will. *Lee* v. *Commissioner,* 57 F. (2d) 399 (App. D. C.), certiorari denied, 286 U. S. 563; *Stratton* v. *United States,* 50 F. (2d) 48 (C. C. A. 1st), certiorari denied, 284 U. S. 651; *Blackburne* v. *Brown,* 43 F. (2d) 320 (C. C. A. 3d); *Fidelity-Philadelphia Trust Co.* v. *McCaughn,* 34 F. (2d) 600, 603 (C. C. A. 3d), certiorari denied, 280 U. S. 602; *Minis* v. *United States,* 66 C. Cls. 58, certiorari denied, 278 U. S. 657; *Whitlock-Rose* v. *McCaughn,* 21 F. (2d) 164 (C. C. A 3d); *Pennsylvania Co.* v. *Lederer,* 292 Fed. 629 (E. D. Pa.). See *Chanler* v. *Kelsey,* 205 U. S. 466, 478–479. The constitutionality of the tax does not depend upon the time when the power was created; the tax may be imposed upon the exercise of a power created before 1916. *Lee* v. *Commissioner, supra; Stratton* v. *United States, supra.*

It is true that Section 302 (f) of the Revenue Act of 1926 (*infra,* p. 42) applies only to the *exercise* of a power of appointment. But we are here concerned only with the constitutional authority of

Congress. If the exercise of a power may be taxed, the failure to exercise it is likewise within the taxing power of Congress. *Chase National Bank* v. *United States,* 278 U. S. 327; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Gwinn* v. *Commissioner,* No. 31, October Term, 1932, decided December 5, 1932.

In addition to the general power to dispose of the property by will, the powers reserved by the decedent enabled him at any time during his life to revoke and annul the interest of any beneficiary named in the trust and appoint a new beneficiary.[2] The decedent thus retained the complete and unfettered power to control the disposition of the property to others. This power was an incident of ownership at least as great as the power to make a gift of the property, which this Court has held may validly be made the subject of a tax measured by the value of the property. *Bromley* v. *McCaughn,* 280 U. S. 124. Since a gift of the property would have been within the taxing power of Congress, it would seem to follow necessarily that the termination of the power to give the property is likewise subject to taxation by Congress.

The death of the decedent resulted in the termination of a general power to appoint the property by will, and in the termination of the power to give

[2] This power was in fact exercised as to the Helen Porter Davisson Trusts Nos. 1 and 2 by the creation of the Helen Porter Davisson Trust No. 3 on November 27, 1926. See p. 36, *infra.*

the property to others. These events, occurring at death, and as a result of death, were the proper subject of an estate tax.

B. The transfers were not complete until the decedent's death

A brief analysis of the trust instruments shows, we believe, that (1) the decedent retained important interests in the trust property, (2) because of these interests which he retained the transfers to the beneficiaries of the trusts were only inchoate until his death, (3) the effect of the decedent's death was to terminate the powers which he retained and thus to transfer to the beneficiaries of the trusts valuable property rights, and (4) that consequently there was a transfer effective on the decedent's death which is properly the subject of the estate tax.

Before the trusts were created in the present case the decedent was the complete owner of the property now in question. When he created the trusts he disposed of those interests in the property which are known as the "legal title," but this alone was of course not enough to keep the property from being subject to the estate tax at his death. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. Besides disposing of the "legal title" he endeavored to divest himself of the right to use the property directly for his own benefit. But this did not make the transfer complete, for he retained the power to "modify or alter" the trusts "in any manner," and

thus retained to himself many of the important interests in the property.[3]

The power retained by the decedent left the interests of the beneficiaries in the present case no more complete until the decedent's death than the interests of the beneficiaries of the "two trusts" in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. They were subject to termination at any time during the settlor's life and without restriction, so far as the beneficiaries were concerned. No plainer demonstration of the incompleteness of the transfers could have been made than that actually included in the tenth paragraph of the trusts that "no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof." The decedent had until his death absolute control over the interest of any beneficiary, and until his death it could not be determined whether the beneficiary designated would receive anything.

Such a right of control residing in the settlor is not compatible with the contention that this was a completed transfer. At the decedent's death, and then only, his power to control the economic enjoyment of the property ceased. There was then a transfer from the decedent to the beneficiaries of interests which for the first time made them the owners of the property. This transfer substan-

[3] Compare the analysis in the American Law Institute's Restatement of Property, Sections 1–7.

tially affected dominion and control over the property. Occurring at the decedent's death and occasioned by his death, it may properly be made the subject of the estate tax.

The correctness of this conclusion is supported by several decisions of this Court holding that, when the interest of a beneficiary remains incomplete until the death of the settlor, the termination of the settlor's power at his death may properly be made the subject of the estate tax.[4] Thus, in *Chase National Bank* v. *United States*, 278 U. S. 327, this Court said (p. 338):

> Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits

[4] In *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271, involving a State succession tax, it was said: "So long as the privilege of succession has not been fully exercised it may be reached by the tax. * * * A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. *Bullen* v. *Wisconsin*, 240 U. S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another. *And so the property passing to the beneficiaries here was acquired only because of default in the exercise of the power during the donor's life* and thus was on his death subject to the state's power to tax as an inheritance." (Italics ours.)

The power of the settlor to change or terminate the trust in the *Saltonstall case* could not be exercised by the settlor alone, but required the "concurrence of one trustee." (276 U. S. 268.) But this limitation on the settlor's power was not regarded by this Court as significant.

> of property which is the real subject of the tax. * * *. And the nonexercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death, *Bullen* v. *Wisconsin*, 240 U. S. 625; * * *.

And later in the same opinion language was used which seems to us practically conclusive in the present case (p. 339):

> As it is the termination of the power of disposition of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death. *Stebbins* v. *Riley*, 268 U. S. 137.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 345, this Court said that "a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death." And in the recent case of *Guinn* v. *Commissioner*, decided December 5, 1932, No. 31, October Term, 1932, this Court, referring to the power of a joint tenant to sever the tenancy, and thus to destroy the right of survivorship, said:

> Cessation of this power after enactment of the Revenue Act of 1924 presented proper occasion for imposition of the tax. The death became the generating source of defi-

nite accessions to the survivor's property rights.

See also *Klein* v. *United States*, 283 U. S. 231.

Most of the petitioners' contentions, we believe, are answered by the decisions of this Court in *Tyler* v. *United States*, 281 U. S. 497, and in *Third National Bank* v. *White*, decided December 19, 1932, No. 202, October Term, 1932. This Court is, of course, familar with the language used in its opinion in the *Tyler case*, and specifically referred to in the *per curiam* decision in the *Third National Bank case*, and it will not be necessary to repeat it here. Practically every sentence of the opinion is directly applicable to the situation in this case. Here "the event is death," and "the result which is made the occasion of the tax is the * * * enlargement of property rights"; for death destroyed the decedent's power to "modify or alter" the trusts "in any manner" and thus made irrevocable and complete interests which until death had been revocable and incomplete. Here "death has brought into being or ripened" for the beneficiaries "property rights." The death of the decedent was "the 'generating source' of important and definite accessions to the property rights" of the beneficiaries. And finally "To include in the gross estate, for the purpose of measuring the tax, the value of property, no part of which originally belonged to" the beneficiaries, but which came to them "as a pure gift from" the decedent, "and which, as a consequence of the latter's death, was relieved from restric-

tions imposed" by the trust instruments "so as to produce in the [beneficiaries] the right of sole proprietorship, is obviously neither arbitrary nor capricious." 281 U. S. at 504–505.

From these cases it is clear that when the economic enjoyment of property remains subject to the control of a person during his lifetime and passes to another at his death only because he has not exercised a power which he might freely have exercised at any time during his life, the property may properly be made subject to the estate tax. The fact that the decedent's power could not be exercised so as to make himself a beneficiary does not limit the applicability of these cases. The interests of the beneficiaries were no more definite on that account; they were no less subject to the decedent's control until his death. The court below aptly described the situation in its opinion (R. 113):

> Though he has finally denuded himself, he controls the disposition while he lives; the existing limitations are conditional upon his pleasure. A gift is a bilateral transaction and demands a donee as well as a donor; it is incomplete though the donor has parted with his interest, if the donee remains indeterminate, and the beneficiaries are determined only when the power to change them ends.

We are not unaware that the tax involved in this case is an estate tax and not a succession tax. It

is the same tax whose application was sustained in the *Tyler* and *Third National Bank cases*. The petitioners' contentions, we believe, are based on their failure to recognize that the powers which the decedent reserved were themselves substantial interests in the property and that as a result of the decedent's death the interests represented by these powers passed from the decedent to the beneficiaries, bringing to them substantial accessions to their property rights equivalent to those lost by the decedent. The fact that the decedent's relation to the property was known as a power rather than as an estate did not mean that he did not have a real interest in the property whose transfer could be subjected to tax. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *supra*. In *Corliss* v. *Bowers*, 281 U. S. 376, this Court said (p. 378) that—

> taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—

and that "from the point of view of taxation there would be no difference" whether or not the taxpayer in a strict sense had title. The Court continued:

> The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power.

Until the decedent's death, the beneficiaries had no power to dispose of the property; that power was retained by the decedent. After the decedent's

death and as a result of it, the beneficiaries acquired the power of disposition. Thus, property rights which were the decedent's until his death became property rights of the beneficiaries after his death and as a result of his death. There was thus a transfer, since the primary meaning of that word is to "cause to pass from one person or place to another."

The petitioners apparently concede that the beneficiaries acquired property rights at the decedent's death and as a result of his death. (Br. 17, 29.) If the beneficiaries acquired property rights by reason of the decedent's death, where did they come from? Whose rights were they before the decedent's death? It is obvious that they were the decedent's, and that as a result of his death they were transferred to the beneficiaries.

The petitioner's contention (Br. 29–31) that the tax is unconstitutional because measured by the full value of the trust property is fully met by several decisions of this Court. In *Tyler* v. *United States*, 281 U. S. 497, *supra*, *Phillips* v. *Dime Trust Co.*, 284 U. S. 160, *supra*, and *Third National Bank* v. *White*, No. 202, October Term, 1932, decided December 19, 1932, *supra*, a tax measured by the entire value of the property was held valid, although the interest of the decedent at the moment of death, and of his estate after death, was *nil*. In *Klein* v. *United States*, 283 U. S. 231, the entire

value of a remainder was taxed, although the interest of the survivor was substantial and irrevocable. In *Chase National Bank* v. *United States*, 278 U. S. 327, *supra*, the tax was measured by the entire proceeds of the insurance policy, although the surrender value while the decedent lived was much less than this amount, and the proceeds after his death were not available to his estate. This Court specifically disposed of the question in the quotation set out on p. 18, *supra*. See also *O'Shaughnessy* v. *Commissioner*, 60 F. (2d) 235 (C. C. A. 6th), now pending on petition for certiorari, No. 604, October Term, 1932; *Commissioner* v. *Emery*, C. C. A. 7th, decided November 26, 1932. These cases establish that the completion of the shifting of the economic benefits of property justifies a tax measured by the value of the property.

Nothing contrary to our contentions was decided in *Heiner* v. *Donnan*, 285 U. S. 312. The transfers there involved were fully made before the decedent's death without the reservation of any powers. Nor is there here any taxing of A on the property of B, which was condemned in *Heiner* v. *Donnan* and in *Hoeper* v. *Tax Commission*, 284 U. S. 206. In the present case the beneficiaries had no property which was not subject to the plenary power of the decedent until his death. The petitioners also invoke *Heiner* v. *Donnan*, *supra*, in support of an argument that the Government is here

trying to impose a gift tax on a past transfer effected when the trusts were created. (Br. 29–30.) But the Government makes no such contention. The transfer which we are seeking to tax occurred at the decedent's death and because of it; it was not consummated by the creation of the trusts. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *supra*.

The trust involved in *Brady* v. *Ham*, 45 F. (2d) 454 (C. C. A. 1st), was established in 1911. The decision is erroneous, we believe, because the court ignored the fact that power over property is an interest in the property, that the retention of such a power constitutes the retention of an important interest in the property, and that the effect of the ceasing of the power on the decedent's death is in substance a transfer to the beneficiaries occasioned by the decedent's death. *Brady* v. *Ham* was reluctantly followed as a controlling precedent by the District Court for Massachusetts in *Washburn* v. *White*, decided November 29, 1932, Prentice-Hall Federal Tax Service, 1933, par. 403. It is difficult to tell the grounds upon which the Court of Appeals of the District of Columbia based its decision in *Cover* v. *Burnet*, 53 F. (2d) 915. For similar reasons, however, that decision seems to us erroneous.[5]

[5] *May* v. *Heiner*, 281 U. S. 238, and *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, related only to the construction of Section 402 (c) of the Revenue Acts of 1918 and 1921, and not to the *power* of Congress. They are accordingly referred to *infra*, p. 33.

C. The Power which the Decedent Reserved was a Valuable Interest in the Corpus of the Trust

The decedent retained the power to "modify or alter" the trusts involved in this case "in any manner." The only qualification on this power was that the decedent might not make such "modification or alteration in his own favor or in favor of his estate." This power thus retained was a valuable asset of the decedent's estate, and as such might validly be included in the measure of the estate tax.

The decedent had unfettered power to determine who should be the beneficiary of the trust. He could at any time have terminated the interests of the beneficiaries named in the original trust instruments and have designated any person he chose in their stead. Obviously such a right had a tangible pecuniary value. Despite the fact that the property had been placed in trust the powers reserved placed him in a position to bargain with a new beneficiary. And since it was within the decedent's power without restriction to direct the trustee to transfer the entire corpus of the trust to any person he might designate, the value of the power which the decedent reserved may fairly be measured by the value of the trust corpus. There is no reason why he could not have obtained that amount for a sale of the right to be the beneficiary of the trusts, or (allowing for a nominal fee to the new beneficiary) so nearly that amount that the difference may be disregarded. The beneficiaries named in the

original trust instrument could not have defeated the claims of purchasers for value who might thus have been substituted as beneficiaries of the trusts. 1 Perry, *Trusts and Trustees* (7th ed.), Sec. 108. Obviously such a right was a right in the corpus of substantial pecuniary value which could properly be included in measuring the tax on the transfer of the decedent's estate.

Such an appointment would not be invalid as a "fraud" on the power. The law as to fraud on powers relates only to special powers to appoint among a limited class.[1] In such cases the donee or holder of the power is in effect a trustee of the power. But here the power is not a special power. The settlor could not be a trustee for all the world except himself. It is well settled that a noncharitable trust with indefinite beneficiaries is not enforceable. *Morice v. Bishop of Durham*, 10 Ves. 522; *Matter of Shattuck*, 193 N. Y. 446.

D. Under the New York Law, the Decedent had the Effective Power to Revoke the Trusts Even for his own Benefit

Under the law of New York, we submit that William H. Porter did, as a substantial matter, re-

[1] The quotation in the petitioners' brief (Br. 20) from Bispham's Principles of Equity (9th ed.), Sec. 256, when put in its context holds no more than this. The sentence immediatley following the petitioners' quotation reads as follows: "If a father has a power to appoint among children, and agrees with one of them, for a sum of money, to appoint to him, such appointment would be void."

tain the power to revoke the trusts involved in this case even for his own benefit. Consequently there can be no question that the value of the property held upon the trusts was properly included as a part of his gross estate for Federal estate tax purposes. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

This conclusion follows, we believe, from the New York statutes and decisions relating to trusts. Section 23 of the New York Personal Property Law[7] provides that:

> Upon the written consent of all persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.

Under this provision the creator of a trust may revoke it at any time with the consent of the beneficiaries.

It may be conceded for the purposes of this case that in the usual situation the reservation of a power to revoke with the consent of the beneficiary is not sufficient to make the disposition subject to the Federal estate tax. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *supra*. But the reason upon which this result is based is that in the usual case

[7] This provision was originally enacted in 1909. New York Laws, 1909, c. 247.

the interest of the beneficiary is adverse to the creator of the trust. This reason was stated in *Reinecke* v. *Northern Trust Co., supra,* in these words (p. 346):

> Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all pracical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.

But this reasoning is not applicable in the instant case. The beneficiaries named in the original deeds of trust were not to be consulted. The settlor of the trusts was free to alter or revoke their interests as he might see fit. No one could dispute his power or prevent its exercise. He alone had the absolute and unfettered power to determine who should enjoy the property and he retained this power until he died.

The settlor might have made anyone the sole beneficiary. Free to choose from all the world, no doubt he could find a beneficiary, his lawyer perhaps, his best friend, or a member of his family, who upon being named the sole beneficiary would consent to revoke the trust as provided in Section 23 of the Personal Property Law. He took no risk in naming a beneficiary for this purpose, for if the beneficiary withheld his consent the settlor could alter the trust and name another more trustworthy to carry out his wishes. Thus, through the

retained control and dominion over the property the settlor could easily be rid of the self-denying limitation which he imposed upon its exercise whenever he desired to do so.

The decisions of the courts of New York sustain such a transaction as that outlined in the previous paragraph. Section 23 of the Personal Property Law applies to a trust even though it is specifically provided in the trust that it shall be irrevocable. *Franklin* v. *Chatham Phenix Nat. Bank & Trust Co.*, 234 App. Div. 369; *Faulkner* v. *Irving Trust Co.*, 231 App. Div. 87; *Aranyi* v. *Bankers Trust Co.*, 201 App. Div. 706; *Schwartz* v. *Fulton Trust Co.*, 119 Misc. 831.[8] Consequently it is immaterial that the trusts expressly provided that Porter's power to alter or amend should not extend so as to make him or his estate beneficiaries. The powers which Porter might exercise were two: (1) that reserved in the instrument creating the trust, *and* (2) that specifically granted by Section 23 of the Personal Property Law. The combined effect of these two powers was to make the trust revocable by Porter at any time until his death.

The New York courts have held that the creator of a trust having the power to alter or amend it may

[8] This conclusion is also supported by the decisions holding that Section 23 is applicable to trusts created before it was enacted, when no such power to revoke was contemplated. *Hoskin* v. *Long Island Loan & Trust Co.*, 203 N. Y. 588, affirming *per curiam*, 139 App. Div. 258; *Sperry* v. *Farmers' Loan & Trust Co.*, 154 App. Div. 447; *Cruger* v. *Union Trust Co.*, 173 App. Div. 797.

exercise that power by naming new beneficiaries, and then, with the consent of the new beneficiaries, may revoke the trust under Section 23 of the Personal Property Law. *Meyer* v. *Bank of Manhattan Trust Co.*, 232 App. Div. 228, and *Faulkner* v. *Irving Trust Co.*, 231 App. Div. 87, both involved trusts very similar to the trusts now in question. In each case the settlor exercised his power to change the beneficiary, and then, with the consent of the new beneficiary, revoked the trust. It was held that the revocations were effective and that the trustee must deliver up the trust propery to the settlor.

II

CONGRESS HAS EXERCISED THE POWER TO PROVIDE THAT THE PROPERTY HERE IN QUESTION SHALL BE INCLUDED IN THE MEASURE OF THE ESTATE TAX

A. The Transfers were intended to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926

Section 302 (c) of the Revenue Act of 1926 (*infra*, pp. 40–41) provides that the value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property—

> To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, * * * intended to take effect in possession or enjoyment at or after his death * * *.

By Section 302 (h) of the Revenue Act of 1926 (*infra*, p. 42) this provision is made to apply to all trusts whether created "before or after the enactment of this Act." It is therefore clear that if the interests of the beneficiaries of these trusts were intended to take effect in possession or enjoyment at or after death Congress intended that the value of the property transferred should be included in the gross estate.[9] *Gwinn* v. *Commissioner*, decided December 5, 1932, No. 31, October Term, 1932.

The provisions included in Section 302 (c) of the Revenue Act of 1926 were present with no material difference in wording in each of the prior Revenue Acts beginning with 1916.[10] The trusts involved in this case were created not earlier than

[9] The following language of the Supreme Court of Vermont in *In re Fulham's Estate*, 96 Vt. 308, 314, is pertinent: "Then, too, we must remember that the section under consideration is not the one that provides for taxing inheritances, direct or collateral, but the one intended to prevent the evasion of such taxes. The very purpose of its enactment was to make it impossible to escape such taxes by transfers merely colorable or fictitious. The policy of such statutes—now in force in many of the states—is that the owner of property shall not evade the tax, except by full and effective transfers made during his lifetime. * * * Surely such a statute should be carefully considered and liberally construed in favor of the taxing power * * * lest its purpose be easily circumvented by designing persons. For, a construction that would facilitate evasion should be avoided."

[10] Sec. 202 (b) of the Revenue Act of 1916; Sec. 402 (c) of the Revenue Act of 1918; Sec. 402 (c) of the Revenue Act of 1921; Sec. 302 (c) of the Revenue Act of 1924.

1918. Therefore, if Section 302 (c) is otherwise applicable, there can be no question of unconstitutionality on the basis of retroactivity, since the original enactment of the provision antedated the creation of the trusts. *Milliken* v. *United States*, 283 U. S. 15; *Klein* v. *United States*, 283 U. S. 231; *Phillips* v. *Dime Trust & Safe Deposit Co.*, 284 U. S. 160; *Guaranty Trust Co.* v. *Blodgett*, No. 217, October Term, 1932, decided January 9, 1933.

Obviously, the purpose of the settlor in reserving the powers which he did in the tenth clause of the trust was to retain full control and dominion over the interest of each beneficiary, so that none of the beneficiaries named in the original trust instruments might have a definite and final interest beyond *his* control so long as *he* lived. The transfer of the trust property was "intended to take effect in possession or enjoyment at or after" the decedent's death. Certainly the "ordinary and usual sense" (*DeGanay* v. *Lederer*, 250 U. S. 376, 381; *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560) of the words used in Section 302 (c) of the Revenue Act of 1926 would require the inclusion of the property held on the trusts involved in this case.

This construction was adopted by this Court in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348, where the words "to take effect in possession or enjoyment at or after his death" were expressly

construed to include interests "passing from the possession, enjoyment *or control* of the donor at his death." (Italics ours.) Here, the decedent had until his death absolute *control* over the interest of the beneficiary, and the property passed from the *control* of the decedent only at his death. The disposition, therefore, was clearly "intended to take effect in possession or enjoyment" at or after the settlor's death, and was thus within the terms of Section 302 (c).

Cases such as *May* v. *Heiner,* 281 U. S. 238, and *Burnet* v. *Northern Trust Co.,* 283 U. S. 782, hold nothing to the contrary. In those cases the transfers were irrevocable. No power was reserved to change the trusts after they were declared. No power, no dominion, and no control remained with the transferor until death. His only interest was a life estate which ended when he died. No power was relinquished at the transferor's death which in any way affected the transfers previously made. *Reinecke* v. *Northern Trust Co., supra,* so far as it related to the five trusts held not taxable, was a similar case. The petitioners refer to the "five trusts" as ones over which the decedent had retained powers. But those powers could only be exercised with the concurrence of some of the beneficiaries, so that the decedent's reserved interest was in fact no greater, as this Court held (p. 346), than "if the gift had been absolute."

B. Section 302 (d) of the Revenue Act of 1926 requires the inclusion of the value of the property in the gross estate

Section 302 (d) of the Revenue Act of 1926 (*infra*, pp. 41–42) is in plain and unmistakable language. It provides that there shall be included in the decedent's gross estate the value of any property—

> of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power * * * to alter, amend, or revoke, * * *.

Applying the words of the statute, it is, of course, plain that the decedent made transfers, that these transfers were in the form of trusts, and that the interests under these trusts were subject at the date of the decedent's death to his power to alter or amend the trusts. By Section 302 (h) it is provided that such property shall be included in the gross estate whether the trusts were created "before or after the enactment of this Act." Therefore, so far as the question of construction is concerned, it is plain that Congress intended that the trust property involved in this case should be included in the measure of the gross estate. *Gwinn* v. *Commissioner*, decided December 5, 1932, No. 31, October Term, 1932; *Third National Bank* v. *White*, decided December 19, 1932, No. 202, October Term, 1932.

The petitioners present an argument that the words "alter, amend, or revoke" in Section 302 (d) should be construed to apply only to a power of revocation. They invoke the maxim *noscitur a sociis*. But such a construction is plainly unwarranted. It is the equivalent of excising from the statute the words "alter" and "amend" which Congress plainly intended to have their usual meaning.[11] Moreover, the construction advanced by the petitioner would make Section 302 (d) wholly meaningless, for trusts subject to a power of revocation are taxable under Section 302 (c). *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. Plainly *noscitur a sociis* has no application here. *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 519. And the petitioners' construction is not aided by the sentence from the report of the Ways and Means Committee which is printed twice in the petitioners' brief. (Br. 22, 25.) The full report of the Committee relating to Section 302 (d) is set out in Appendix B (*infra*, p. 44); it shows clearly the intention of Congress to tax any trust where the interests of the beneficiaries is subject to a power of *change* in the settlor.

[11] Substantially the same argument is made in one of the briefs filed by *amici curiae*, where it is urged that the words "any change" should in effect apply only where a power to revoke has been reserved. This contention ignores the fact that when Congress used the words "alter, amend, or revoke" it obviously meant to include more than mere powers to revoke.

The petitioners also call to their aid supposed cases where the power to change reserved to the settlor might be very slight, and they seek comfort in the fact that difficulties might be found in the way of applying the statute in such a case. (Br. 22, 26, 27.) It will be time enough to deal with those cases when they arise. Doubtless powers might be reserved so meager that their termination would not furnish a proper basis for taxation. But no meager power is involved in this case. The powers reserved here were to "modify or alter" the trusts "in any manner." The settlor's power over the interests of any beneficiary was absolute, complete, and unqualified. A transfer subject to such a power is plainly within the terms of Section 302 (d). There can be no doubt that Congress has exercised the power to include these transfers in the measure of the gross estate.

These provisions of Section 302 (d) were first included in the Revenue Act of 1924; but they may constitutionally be applied, we believe, to trusts created before that enactment.[12] This follows from the decision in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. The only difference between that case and this is that here the decedent's power

[12] It is not conceded that the Helen Porter Davisson Trust No. 3 was created before the enactment of the Revenue Act of 1924. The Helen Porter Davisson Trusts Nos. 1 and 2 were created in 1918 and 1919, subject to the decedent's power to "modify or alter" in any manner except that he might not make himself a beneficiary. On November 27, 1926, the decedent exercised this power by instruments in

to "modify or alter" the trusts "in any manner" was subject to the qualification that he might not make himself beneficiary. But the interests of the beneficiaries were no less indefinite and uncertain because of this qualification on the power. The decedent retained the unfettered right and power to terminate their interests at any time. The ceasing of this power on his death was in substance a transfer to them at that time of valuable property rights. Since this transfer took place at the decedent's death, after the enactment of the Revenue Act of 1926, there is no question of retroactivity involved, and the expressed will of Congress may constitutionally be applied to these trusts.

Any doubt which might have existed on this question is certainly removed by this Court's decision in *Third National Bank* v. *White,* decided December 19, 1932, No. 202, October Term, 1932, on the authority of *Tyler* v. *United States,* 281 U. S. 497, 504, 505, and *Gwinn* v. *Commissioner, supra.* The *Third National Bank case* involved a tenancy by the entirety created in 1915. This was an irrevocable disposition of property prior to the enactment

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which he declared, "I hereby revoke said Deed and terminate the interests of all persons therein, * * *" and directed the trustee to hold the trust property as trustee "under a new Deed of Trust." (R. 46.) He then executed a complete new trust instrument, dated and executed November 27, 1926, and declaring his purpose "to create a trust." (R. 30.) This trust is the Helen Porter Davisson Trust No. 3. The trustee accepted it as a new trust and regarded the former trusts as terminated.

of any Federal estate tax law. This Court nevertheless held that the tax was properly imposed, since the decedent's death occurred after the enactment of the Revenue Act of 1924, and resulted in definite accessions to the property rights of his surviving wife. In the present case the interests which passed to the beneficiaries through death were even greater than those which devolved on the wife in the *Third National Bank case;* for there the wife obtained from the original creation of the tenancy a definite interest over which her husband had no power, and which would ripen into complete ownership of the property if she survived her husband. In the present case the beneficiaries, until the decedent's death, had no certain interest which was not at all times wholly subject to the decedent's power. At his death, and as a result of it, their interests for the first time became final, complete, and irrevocable. Under the decisions of this Court in the *Tyler, Gwinn,* and *Third National Bank cases,* this was a taxable event, and since it occurred after the enactment of the taxing statute the tax was validly imposed.

The *Third National Bank case* also disposes of the petitioners' argument that the tax is unconstitutional because when the decedent created the trusts, he "could not have foreseen the tax burden," and because "he not only divested himself of the property but he made it impossible to repossess the property either for himself or his estate." (Br. 33.) Exactly the same objections were advanced

against the taxation of the tenancy by the entirety involved in the *Third National Bank case,* and were rejected by this Court. It was just as true in the *Third National Bank case* as here that, in the petitioners' language (Br. 33), when "the statute was enacted it was beyond his power to restore either himself or his estate to a position where the tax could be paid out of the property transferred. * * * in this instance by no possibility could the property previously transferred be included among the assets from which the tax could be paid."

In any event, as we have already pointed out, there is no question of retroactivity in this case, as the transfers were taxable under Section 302 (c), a provision which was in effect before the original creation of any of the trusts.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

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FEBRUARY, 1933.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

STATUTES

The Revenue Act of 1926, c. 27, 44 Stat. 9, 69, 70–72, provides in part as follows:

> SEC. 301. (a) In lieu of the tax imposed by Title III of the Revenue Act of 1924, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, whether a resident or nonresident of the United States;
>
> * * * * *
>
> (U. S. C. App., Title 26, Sec. 1092.)
>
> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> (b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for ade-

quate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years

prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

* * * * *

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth; and

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

(U. S. C. App., Title 26, Sec. 1094.)

REGULATIONS

Regulations 70 (1926 ed.), promulgated August 24, 1926, and Regulations 70 (1929 ed.), promulgated March 23, 1929, provide in part as follows:

ART. 18. * * *

* * * * *

Where there was no reservation of income or an annuity but it was intended that possession or enjoyment of the transferred property or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable, although the income or annuity was payable during the decedent's life to some one other than himself. Example: The decedent transferred property to his son, the latter to receive the income during the decedent's life or agreeing to pay the income to his mother during the decedent's life. The transfer to the son in either case is taxable.

ART. 19. *Power to change enjoyment.*— The value of property transferred, other than by a bona fide sale for an adequate and full consideration in money or money's worth, constitutes a part of the gross estate if at the time of the decedent's death the enjoyment thereof was subject to any change through a power, exercisable either by the decedent alone or in conjunction with any person, to alter, amend, or revoke.

* * * * *

APPENDIX B

CONGRESSIONAL COMMITTEE REPORTS

The report of the Ways and Means Committee of the House on the Revenue Bill of 1924 (House Report No. 179, 68th Cong., 1st Sess., p. 65) contains the following:

> SEC. 302 (d):
>
> By this subdivision if the decedent had the power at the time of his death to change the enjoyment of a property interest, which he had transferred, or with respect to which he had created a trust, such interest is to be included for estate tax purposes in his gross estate. Likewise, if the decedent had relinquished such a power in contemplation of death, except by a sale for a fair consideration, the property interest over which he had such a power is to be included in his gross estate.
>
> Even though the decedent has made the transfers specified in this subdivision, he has retained substantial control over the disposition of the property, through the power to change the enjoyment thereof. Such property interests should therefore fairly be taxed as part of the decedent's estate, particularly since, by virtue of his death, the substantial interest which he had has been wiped out, and to the same extent the property interest of the legal title holder, his transferee, has been increased. This provision is in accord with the principle of section 219 (g) of the bill which taxes to the grantor the income of a revocable trust.

The same language is included in the report of the Committee on Finance of the Senate (Senate Report No. 398, 68th Cong., 1st Sess., pp. 34–35).

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